



## Development Tribunal – Decision Notice

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### *Planning Act 2016, section 255*

<b>Appeal Number:</b>	23-007
<b>Appellants:</b>	Wayne Andrew Faulkner and Susan Rebecca Faulkner
<b>Respondent:</b>	Bundaberg Regional Council
<b>Site Address:</b>	2 Patersons Road, Bundaberg North described as Lot 1 on RP57019

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### **Appeal**

Appeal against the decision of Bundaberg Regional Council dated 19 January 2023 for operational work for filling and excavation of land.

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<b>Date of decision:</b>	31 May 2023
<b>Date and time of hearing:</b>	On the papers
<b>Tribunal:</b>	Michelle Pennicott    Chair Richard Prout        Member Bryan Payne          Member

### **Decision:**

The Tribunal does not have jurisdiction for the proceedings.

### Note—

Pursuant to section 252(3) of the *Planning Act 2016*, any period for starting proceedings in the Planning and Environment Court for the matter that is the subject of the tribunal proceedings, starts again when the tribunal gives the decision notice to the party who started the proceedings.

### See:

- Section 229 and Schedule 1 of the *Planning Act 2016* for the Planning and Environment Court's appeal jurisdiction.
- Section 11 of the *Planning and Environment Court Act 2016* for the Planning and Environment Court's declaratory jurisdiction.
- For general information about the Planning and Environment Court:  
<https://www.courts.qld.gov.au/courts/planning-and-environment-court>

## Appeal

1. The appeal is against the Council's decision dated 19 January 2023 in respect of the Appellants' development application for operational work for filling and excavation.
2. The development application (as changed and accepted as properly made on 26 October 2022) sought approval for:
  - (a) Drainage channel works in blue hatching on Figure 2;
  - (b) Drainage channel works in purple hatching on Figure 2;
  - (c) Minor site shaping in green hatching marked 'Section A' on Figure 1;
  - (d) Minor site shaping in green hatching marked 'Section B' on Figure 1;
  - (e) Driveway in grey hatching on Figure 5.
3. The Council's decision of 19 January 2023 was an approval in part and refusal in part:
  - (a) Approved the drainage channel works in blue hatching on Figure 2;
  - (b) Approved the drainage channel works in purple hatching on Figure 2;
  - (c) In relation to the minor site shaping in green hatching marked 'Section A' on Figure 1:
    - (i) refused that part of the works located within the watercourse buffer;
    - (ii) approved the remaining part;
  - (d) Refused the minor site shaping in green hatching marked 'Section B' on Figure 1;
  - (e) In relation to the driveway in grey hatching on Figure 5:
    - (i) approved that part before the creek bed marked on Figure 5; and
    - (ii) refused the remaining part.
4. The approval in part was subject to conditions set out in Attachment A of the decision notice.
5. The Appellants' grounds of appeal state:

“... Council's draft decision contained 29 conditions, imposing such unreasonable, onerous and cost-prohibitive requirements, that we requested a meeting to discuss. Following this 2 hour meeting, in which it was discussed that Council is already contradicting earlier advices that the land was low risk and no further engineering was required, Council's final decision contained 33 conditions and prohibited any work at all on large portions of our land. No restrictions were identified during searches at the time of purchase ...”
6. The documents accompanying the notice of appeal include a document dated 14 December 2022 attaching a table of the Applicant's response to each of the draft conditions.

## **Jurisdiction**

7. The jurisdiction of the Tribunal in relation to appeals is limited to appeals involving a matter set out in the *Planning Act 2016*, Schedule 1, section 1(2).
8. In relation to a development approval for operational work, the jurisdiction of the Tribunal is limited to an appeal against a provision of a development approval for operational work “associated with building work, a retaining wall, or a tennis court”: *Planning Act 2016*, Schedule 1, section 1(2)(b)(ii).
9. Similarly, the Tribunal only has jurisdiction to hear an appeal against a refusal of a development application for operational work “associated with building work, a retaining wall, or a tennis court”: *Planning Act 2016*, Schedule 1, section 1(2)(a)(ii).
10. On 2 May 2023, the Tribunal notified the parties that it would decide on the written material (without a hearing) whether the Tribunal has jurisdiction to hear the appeal.
11. The parties have provided the following to the Tribunal on the question of jurisdiction:
  - (a) Appellants’ emails of 26 February 2023 and 16 May 2023;
  - (b) Council’s letter of 23 March 2023 and email of 11 May 2023.

## **Appellants’ position on jurisdiction**

12. The Appellants submit that the operational work is associated with building work.
13. The Appellants say all of the works are connected with their plans to build a permanent dwelling on the site.
14. The Appellants have provided the Tribunal with construction plans and 3D renders to show the progress they have made in advancing those plans.
15. The Appellants say the Council was aware of their plans to build a dwelling on the site because:
  - (a) Council was aware of the house pad constructed by previous owners;
  - (b) power, water and sewerage connections exist to the site;
  - (c) Council was informed on 26 June 2022 that the Appellants had met with a builder and draftsman and were working through the design of the main dwelling;
  - (d) the 3D renders were made available for viewing at an onsite meeting on 18 July 2022.

## Council's position on jurisdiction

16. The Council submits that:
  - (a) section 1(2)(d) of Schedule 1 of the *Planning Act 2016* is the specific right of appeal relating to development conditions and is not applicable because it only applies to conditions for a material change of use of a class 2 building of no more than 3 storeys and no more than 60 sole occupancy units;
  - (b) given section 1(2)(d) specifically provides for appeals about development conditions, section 1(2)(b) is unlikely to have any application;
  - (c) in any event section 1(2)(b) is not engaged because the operational work is not associated with building work.
17. The Council says the construction plans and 3D renders were not submitted to Council as part of the operational work application and Council has no record of a building work approval existing for them. Further, the proposed buildings are located on part of the site that is not subject to any proposed operational work in the application.

## Reasons

18. Dealing first with the Council's submission that section 1(2)(b) is unlikely to have any application because development condition appeals are specifically provided for in section 1(2)(d):
  - (a) The Tribunal does not agree that an appeal against conditions is confined to section 1(2)(d);
  - (b) The Tribunal's interpretation is that section 1(2)(d) operates to provide a limited right of appeal if the material change of use is of a class 2 building – the class 2 building must be of a certain scale only and the appeal can only be against a development condition;
  - (c) In contrast, section 1(2)(b) provides a broader right of appeal for development approvals mentioned in that sub-section. That broader right of appeal is against any provision of such a development approval. "Provision" is defined to mean all words or other matters forming part of the approval and a development condition is one of the examples: *Planning Act 2016*, Schedule 2 (Dictionary).
19. Therefore, provided the operational work is associated with building work, a retaining wall or a tennis court, the Tribunal has jurisdiction to hear an appeal against a development condition of a development approval for operational work.
20. It is therefore necessary to go on to determine whether the operational work is associated with building work.
21. On that point, the Tribunal agrees with the Council's submission that the operational work is not associated with building work.

22. The development application described the purpose of each component of operational work applied for in the following terms:
- (a) Drainage channel works in blue hatching on Figure 2:

“The complete concept of the drainage works is to give a more naturalised look and feel on our property. At present we cannot mow the grass in the drain as it is always too wet from the water sitting in the drain. This is also causing a place for mosquito to breed.”
  - (b) Drainage channel works in purple hatching on Figure 2:

“The complete concept of the drainage works is to stop the water from sitting in a low spot on the property. We will be creating a very natural-looking drain which will allow the water to flow into the dam on the property. This is also causing a place for mosquito to breed.”
  - (c) Minor site shaping in green hatching marked ‘Section A’ on Figure 1:

“The reason for this operational works is to level the land. At present it is ‘bumpy’ and hard to mow, and we are looking at having a flatter block of land so it is easier to mow and gives a much nicer naturalised appearance.”
  - (d) Minor site shaping in green hatching marked ‘Section B’ on Figure 1:

“Request: The owners have advised of desire to undertake minor shaping of the land with the intention of removing the localised low points which allow water to pond.”
  - (e) Driveway in grey hatching on Figure 5:

“We are proposing to build a driveway to our building site from the Patersons Rd entrance. We propose that we excavate 250mm down for the length of the driveway. We will add gravel for a base and have it rolled for compaction and then we will add decomposed granite as the driveway surface which will also be compacted. The driveway will not exceed the land’s original height.”
23. The only potential association between the operational work and building work is in relation to the driveway component which described the driveway as being “to our building site”. However there is no specific identification of the building site let alone details of building work to be carried out on the building site.
24. The dictionary meanings of “associate” include “3. to unite; combine”<sup>1</sup> and “4. to combine for a common purpose, to join or form an association”<sup>2</sup>.
25. In a different statutory context relating to domestic building work contracts (which extended to any work “associated” with the erection of a home), it was held that to be “associated” requires “*a degree of contemporaneity*” between the works and the related associated development.<sup>3</sup>

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<sup>1</sup> Macquarie Dictionary Online

<sup>2</sup> The Oxford English Dictionary (2<sup>nd</sup> edition), applied in *Kia Australia Pty Ltd v Chief Executive Officer of Customs* (1998) 86 FCR 473 at 480

<sup>3</sup> *Winslow Constructors Pty Ltd v Mt Holden Estates Pty Ltd* (2004) 10 VR 435 at 464

26. In the Tribunal's view, in the statutory context of the *Planning Act 2016*, there must be a specific work in the nature of building, repairing, altering, underpinning, moving, demolishing a building or structure, incidental excavating or filling, supporting etc falling within the definition of 'building work' in the *Planning Act 2016*<sup>4</sup> and that specific work must be identified or described in the operational work development application for the operational work to be "associated with building work".
27. While the Appellants' intentions to build a dwelling on the site are not doubted, the operational work the subject of the development application and development approval under appeal is not "operational work associated with building work".
28. The Tribunal does not have jurisdiction for the appeal.

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**Michelle Pennicott**  
**Development Tribunal Chairperson**

#### **Enquiries**

All correspondence should be addressed to:  
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<sup>4</sup> Schedule 2 (Dictionary):

(a) means—

- (i) building, repairing, altering, underpinning (whether by vertical or lateral support), moving or demolishing a building or other structure; or

Example—  
building a retaining wall

- (ii) works regulated under the building assessment provisions; or
- (iii) excavating or filling for, or incidental to, the activities stated in subparagraph (i); or
- (iv) excavating or filling that may adversely affect the stability of a building or other structure, whether on the premises on which the building or other structure is situated or on adjacent premises;
- (v) supporting (vertically or laterally) premises for activities stated in subparagraph (i)